Decisions of the United States
Court of International Trade

Slip Op. 07–111

WHIRLPOOL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 03–00526

PUBLIC VERSION

[Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Motion for Summary Judgment is GRANTED.]

Dated: July 18, 2007

Baker & McKenzie LLP, (*Lynn S. Preece*, *Bart M. McMillan* and *Louisa V. Carney*) for Plaintiff Whirlpool Corporation.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*); and *Chi S. Choy*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Counsel; for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

Plaintiff Whirlpool Corporation ("Whirlpool") challenges the decision of the United States Customs and Border Protection ("Customs") to classify its imported merchandise (entry number 327–0126404–9) under Heading 9032 of the Harmonized Tariff Schedule of the United States ("HTSUS") 1999 as an "[a]utomatic regulating or controlling instrument[ ] and apparatus" at a duty rate of 1.7% *ad valorem*.[1] This court has jurisdiction pursuant to 28 U.S.C.

[1] This rate represents the Column 1 general rate for HTSUS Subheading 9032.89.60 in effect at the time of entry in 1999.

§ 1581(a), and jurisdiction is uncontested by the parties. Because the subject merchandise is classified under an *eo nomine* designation as an automatically controlling apparatus in HTSUS Heading 9032, Customs' classification of the refrigerator control box subassembly in subheading 9032.89.60 was proper. Accordingly, Plaintiff's Motion for Summary Judgment is Denied and Defendant's Motion for Summary Judgment is Granted.

II
BACKGROUND

Plaintiff Whirlpool is the importer of record for entry number 327–0126404–9, consisting of refrigerator control box subassemblies–1 knob, identified as part number 2204604. Amended Complaint ("Complaint") ¶ 2; Answer to Amended Complaint ("Answer") ¶ 2; Composite Statement of Uncontested Facts ¶ 8. The subject merchandise was exported from Mexico by Whirlpool de Reynosa, S.A. de C.V., and entered the United States through the port of Hidalgo, Texas on March 30, 1999. In its imported condition the merchandise consisted of a thermostat, defrost timer, light socket, and wire harness, all of which were contained inside a plastic housing.[2] Complaint ¶ 2–3, 5; Answer ¶ 2–3, 5. Customs classified part number 2204604 under HTSUS Subheading 9032.89.60[3] and liquidated on March 8, 2002, assessing duties at the rate of 1.7% *ad valorem* and disallowed duty-free treatment under the North American Free Trade Agreement ("NAFTA"). Complaint ¶ 6–8; Answer ¶ 6–8. Plaintiff timely paid all additional duties and fees assessed on liquidation, and on June 5, 2002, filed a protest against Customs' classification and liquidation decision and its denial of NAFTA benefits for the entry.[4] Complaint ¶ 9, 10; Answer ¶ 9, 10. Customs denied the protest on February 13, 2003, and Plaintiff timely filed a summons with this court on July 30, 2003. Whirlpool argues that the subject merchandise was improperly classified in HTSUS subheading 9032.89.60, and should instead have been classified in HTSUS subheading 8537.10.90,[5] or alternatively in HTSUS subheading 8418.99.80.[6]

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[2] Plaintiff alleges that the imported merchandise also contained "terminals and connectors," but the Government denies this. This discrepancy is not material to the court's decision, however.

[3] HTSUS Heading 9032 and subheading 9032.89.60 provide for:

9032	Automatic regulating or controlling instruments and apparatus; parts and accessories thereof:		
	* * *		
9032.89.60	Other	1.7%	Free (MX)

[4] Protest number 2304–02–100182.

[5] HTSUS Heading 8537 and subheading 8537.10.90 provide for:

8537	Boards, panels, consoles, desks, cabinets and other bases, equipped

Complaint ¶ 13, 15, 23. Both parties submitted motions for summary judgment before this court. Oral Argument on those motions was held on April 3, 2007.

III
STANDARD OF REVIEW

A motion for summary judgment is granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c). In classification cases, "the proper classification under which [an article] falls . . . has always been treated as a question of law," thus, summary judgment will be appropriate when there is no underlying factual issue regarding the nature of the merchandise remaining in dispute. *Bausch & Lomb Inc. v. United States*, 148 F.3d 1363, 1366 (Fed. Cir. 1998).

The court reviews classification cases *de novo* in accordance with 28 U.S.C. § 2640(a). When deciding classification cases, the court employs a two step analysis in which the first step "concerns the proper meaning of the tariff provisions at hand," and the second step "concerns whether the subject imports properly fall within the scope of the possible headings." *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Additionally, the factual determinations made by the agency are presumed to be correct, therefore "the party challenging the classification . . . bears the burden of proof." *Totes, Inc. v. United States*, 69 F3d 495, 498 (Fed. Cir. 1995) (citing 28 U.S.C. § 2639(a)(1)).

IV
DISCUSSION

The HTSUS General Rules of Interpretation ("GRI") govern the classification of merchandise entering the United States. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). GRI 1 states, in pertinent part, that "for legal purposes, clas-

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with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517:

8537.10	For a voltage not exceeding 1,000 V:	
8537.10.90	Other	Free (MX)

[6] HTSUS Heading 8418 and subheading 8418.99.80 provide for:

8418	Refrigerators, freezers and other refrigerating or freezing equipment, electric or other; heat pumps, other than the air conditioning machines of heading 8415; parts thereof:	
	* * *	
8418.99.80	Other	Free

sification shall be determined according to the terms of the headings and any relative section or chapter notes." Harmonized Tariff Schedule of the United States, General Rule of Interpretation ("GRI") 1. An *eo nomine* provision describes goods according to their "common and commercial meaning." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). A court may "rely upon its own understanding of the terms used" or consult lexicographic authority or other reliable sources to define a term. *Id.* If classification is not resolved by application of GRI 1, the court will refer to the succeeding GRIs in numerical order. *See, e.g., Conair v. United States*, Slip Op. 05–95, 2005 Ct. Int'l Trade LEXIS 104, at *7 (CIT August 12, 2005).[7]

A
Part Number 2204604 was Properly Classified in HTSUS Heading 9032

1
Apparatus

Plaintiff first argues that the subject merchandise is not an apparatus as termed by Heading 9032 because "it has several and not a single given purpose." Plaintiff's Memorandum in Support of Motion for Summary Judgment ("Plaintiff's Brief") at 14. In support of this assertion, Whirlpool cites *ITT Thompson Industries v. United States*, 3 CIT 36, 44, 537 F. Supp. 1272, 1277–78 (1982), *aff'd*, 703 F.2d 585 (Fed. Cir. 1982), which defines an apparatus as "a group of devices, or a collection or set of materials, instruments or appliances to be used for a particular purpose or a given end." *Id.* at 13.

Plaintiff is incorrect in its assertion that the subject merchandise cannot be an apparatus because all of its components do not share the same purpose. In *General Electric Co. v. United States*, 247 F.3d 1231 (Fed. Cir. 2001), *amended on limited grant of rehearing*, 273 F.3d 1070 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit found an item to be a "combination apparatus" when it contained two components that needed to "independently perform their nonsubordinate functions if the [item] is to operate properly." *General Elec.*, 247 F.3d at 1235. The refrigerator control box subassembly is similarly a combination apparatus, including several components that have independent and non-subordinate functions.

Plaintiff next argues that, if the subject merchandise is an apparatus, it is not an apparatus under Heading 9032. Plaintiff's Brief at 14. Plaintiff agrees that the thermostat located within part number 2204604 constitutes an apparatus for automatically controlling temperature as specified in Heading 9032, but argues that the control

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[7] As part number 2204604 is classifiable using GRI 1, discussion of subsequent GRIs has been omitted.

box in its entirety does not meet the requirements to be classified as such. *Id.* According to Plaintiff, since the given purpose of the apparatus is to act as a user interface and not only to control temperature, classification in Heading 9032 is precluded. Plaintiff's Brief at 14–15 (citing *General Elec.*, 247 F.3d at 1235 for the proposition that a tariff heading that describes one component of a combination apparatus is not sufficiently specific to mandate classification in that heading).

Defendant counters that the refrigerator control box subassembly can be classified in Heading 9032 by reference to HTSUS GRI 1.[8] Defendant's Reply Brief in Support of Our Motion for Summary Judgment and in Opposition to Plaintiff's Response ("Defendant's Reply") at 9. According to Defendant, the defrost timer and the thermostat both fall within the definition of "automatic regulating or controlling instruments or apparatus" when viewed in conjunction with Note 3[9] (which applies Note 4 of Section XVI to Chapter 90) and Note 6[10] of Chapter 90. *Id.* at 9–10. Defendant asserts that once the principles of Note 4 of Section XVI are applied the merchandise in issue meets the qualifications of Heading 9032, as it is a machine[11] consisting of individual components which, with the exception of the light socket, contribute together to the function of temperature control. *Id.* at 10.

2
Instruments

As noted above, analysis of classification within the headings of the HTSUS begins with HTSUS GRI 1, which states that "classification shall be determined according to the terms of the headings and

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[8] In Defendant's Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Brief") Defendant also argues that the subject merchandise is classifiable in Heading 9032 by following a GRI 3(b) analysis. Defendant's Brief at 17. Because the merchandise is classifiable under a GRI 1 analysis as the Defendant later argues in its Reply, the GRI 3(b) argument need not be addressed.

[9] HTSUS Chapter 90 Note 3 asserts that "[t]he provisions of note 4 to section XVI apply also to [Chapter 90]." Note 4, Section XVI provides:

> Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in [Chapter 90], then the whole falls to be classified in the heading appropriate to that function.

[10] HTSUS Chapter 90 Note 6(a) (after 2002 renumbered as Note 7) limits Heading 9032 to "[i]nstruments and apparatus for . . . automatically controlling temperature, whether or not their operation depends on an electrical phenomenon which varies according to the factor to be automatically controlled."

[11] As Defendant notes, the term "machine" as stated in Note 4, and applied by Chapter 90, Note 3, is defined in Section XVI, Note 5 as "any machine, machinery, plant, equipment, apparatus, or appliance cited in the headings of . . ." Chapter 90.

any relative section or chapter notes." HTSUS Heading 9032 provides for "[a]utomatic regulating or controlling instruments or apparatus; parts and accessories thereof," which are further described in Chapter 90, Note 6, as instruments and apparatus "for automatically controlling temperature." Note 2(a) to Chapter 90 states, "[p]arts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85, or 91 . . . are in all cases to be classified in their respective headings."

The parties are in agreement that the thermostat located in part number 2204604 automatically controls temperature,[12] and that the light socket and wire harness (as individual units) do not automatically control or regulate temperature, but the nature of the role of the defrost timer remains in dispute. Plaintiff's Composite Statement of Uncontested Facts ("Uncontested Facts") ¶ 33; Complaint ¶ 20; Answer ¶ 20. The defrost timer in part 2204604 works in conjunction with the defrost heater to control the defrosting operation of the refrigerator. Uncontested Facts ¶ 49. It accumulates the compressor run time, and, after a pre-determined amount of time, will redirect power to the defrost heater which melts and disburses any ice that had formed on the evaporator coils. *Id.*; *see* Michael D. Blankenship 2d Affidavit, August 2, 2006 ("Blankenship 2d Aff."), ¶ 21 (asserting, "the ice [that had accumulated on the evaporator coil] is then cleared from the coil by using a heater controlled by the defrost timer . . . in part number 2204604"). The defrost timer will then terminate the defrost after a set amount of time by redirecting power through the thermostat. Uncontested Facts ¶ 51.

As the defrost timer functions by monitoring the compressor run time and using that information to regulate when the defrost heater is on or off, Uncontested Facts ¶ 49, it acts as an automatic temperature controller. Though its temperature regulation is not constant, the purpose of the device and the desired outcome of its action is to change temperature such that it will heat the evaporator coils and melt any ice present on them. It does this automatically upon gathering information as to the length of time the compressor has run, and automatically allows the temperature to readjust when the function is complete. Uncontested Facts ¶¶ 49–51. Tellingly, the sole attachment that it controls is described by Mr. Blankenship only as a "heater," clearly designed to raise the temperature on the coils at the defrost timer's signal. Blankenship 2d Aff. ¶ 21. Though the item monitors time, the purpose and intended outcome of the device's

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[12] The thermostat located in part number 2204604 functions by lowering the air temperature in the refrigerator by sending electricity through the wire harness to the compressor, condenser fan motor, and evaporator fan motor, signaling them to run until it senses a pre-determined air temperature. Composite Uncontested Facts ¶ 47. This action qualifies as automatic regulation of temperature and falls within the scope of HTSUS Heading 9032.

function is temperature control, and thus the defrost timer is properly classified in Heading 9032.[13]

The wire harness located within the refrigerator control box subassembly sends electrical signals to and from the other components located therein, allowing them to complete their functions by connecting to the main refrigerator wiring harness, which in turn is connected to the other working parts of the refrigerator. Uncontested Facts ¶ 35, 38. The wire harness is thus a component "intended to contribute . . . to a clearly defined function;" it sends the information from the defrost timer and thermostat to other areas of the refrigerator with the purpose of regulating temperature. HTSUS Section XVI, Note 4. Therefore, according to Section XVI, Note 4 (applied via Chapter 90, Note 3), the wire harness also "falls to be classified in the heading appropriate to that function," and is properly classified in Heading 9032 along with the thermostat and defrost timer components.

The only component of the refrigerator control box that is not involved in the automatic regulation of temperature in any way is the light socket. Thus, the intended purpose of the refrigerator control box *as a whole* is the automatic regulation of temperature; it is the main function of the items within the control box and the most important function in relation to the purpose of the refrigerator. Part number 2204604 therefore meets the terms of Heading 9032 when viewed in conjunction with the notes to Chapter 90, and was properly classified under HTSUS subheading 9032.89.60.

B
Part Number 2204604 Cannot be Classified in HTSUS Heading 8537 or 8418

Plaintiff argues that the subject merchandise is properly described under Heading 8537 as a panel, equipped with two or more apparatus of heading 8535 or 8536, for electric control. Plaintiff's Brief at 17. According to Plaintiff, the plastic housing constitutes a foundation or base upon which electrical devices rest, and the light socket and terminals attached to the wire harness are items classified under Heading 8536. *Id.* Plaintiff also asserts that the control box's function meets the definition of "electric control" as involving a process in which "information is input, and as a consequence, electricity causes the desired result to occur." *Id.* (quoting *Universal Elecs.*, 112 F.3d at 494). Plaintiff argues that information is input when the thermostat or defrost timer sense temperature or passage of time, causing the wire harness to send electricity to another part of the re-

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[13] During oral argument, counsel for Plaintiff argued that an item is properly classified under the HTSUS by what it is, not by what it does. This assertion fails to take into account the specification in Note 4 to classify components by function.

frigerator that will lower the temperature or start the defrost function. *Id.* at 18–19. Plaintiff additionally argues that the flow of electricity through the wire harness to the light socket resulting from the switch triggered by the refrigerator door also qualifies as an example of the merchandise functioning "for electric control." *Id.* at 19. Plaintiff concludes that because the merchandise should be classified under Heading 8537, the necessary tariff shift occurred,[14] and part number 2204604 qualified as a NAFTA good on entry. *Id.* at 20.

Defendant responds that the subject merchandise is not within the scope of Heading 8537 because it does not contain two or more apparatus of Heading 8535 or 8536, and it is not "for electric control." Defendant's Brief at 7. According to Defendant, the merchandise at issue has only one apparatus of Heading 8536, the light socket, as the wire harness and its components identified by Plaintiff falls under Heading 8544 (insulated wire, cable, or other electric conductors, whether or not fitted with connectors). *Id.* at 8. Defendant also argues that the subject merchandise does not qualify as an item "for electric control" because it does not provide an electrical means for an individual to control the targeted appliance as was there in *Universal Electronics*, 112 F.3d at 494. *Id.* at 9–10. Defendant additionally notes that the article in question is not for the distribution of electricity, though Plaintiff does not argue that it is. *Id.* at 12–13.

Plaintiff also argues that the subject merchandise is described under Heading 8418 as a refrigerator part because it is "an integral, constituent part of a complete, functioning refrigerator," and it is " 'dedicated solely for use' with a refrigerator." Plaintiff's Brief at 21 (citing *United States v. Willoughby Camera Stores, Inc.*, 21 CCPA 322, 324 (1933) and *United States v. Pompeo*, 43 CCPA 9, 14 (1955)). Though it asserts that the subject merchandise properly fits in Heading 8418, Plaintiff states that Note 2(a) to Section XVI requires that it be classified in Heading 8537 if it qualifies for both.[15] *Id.* at 22. While Defendant does not dispute that the subject merchandise comes within the terms of Heading 8418, it argues that because the merchandise at issue is also provided for in Heading 9032, it is properly classified there.[16] *Id.* at 19.

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[14] HTSUS 1999 General Note 12(t), Chapter 85, subheading 121(A) required, in relevant part, that a good qualifying as a NAFTA-originating good must have non-originating materials that have undergone a tariff shift from any other heading during the manufacturing process in the NAFTA country. Plaintiff argues that once the thermostat, the only non-originating material in the subject merchandise, was assembled into the refrigerator control box subassembly, it shifted from heading 9032 to heading 8537 as required. Plaintiff's Brief at 20.

[15] Note 2(a) to Section XVI requires that parts which are goods under Heading 84 or 85 must be classified "in their respective headings." Plaintiff argues that as the subject merchandise is a good under Heading 8537 that classification takes precedence over the part classification in Heading 8418. Plaintiff's Brief at 22.

[16] Defendant argues that Heading 9032 is more specific than Heading 8418, citing

As established in section A above, the merchandise in question fits into the terms of Heading 9032. Because of this, analysis of the scope of Chapter 84 and 85 falls within the provisions of Note 1(m) to Section XVI, which states that the section does not cover Articles of Chapter 90, such as the refrigerator control box subassembly here. The merchandise thus cannot be classified under subheading 8537 or 8418 regardless of whether it can be described by those headings, due to the mandate of the section notes.

Additionally, even if the subject merchandise were not within the terms of a Chapter 90 Heading it would still not be classifiable under Heading 8537. While the Court of International Trade in *Universal Electronics* acknowledges that 8537.10.90 refers to a "broad range of items," it also specifies that in order to fall within the subheading an item "must be part of a system in which information is input, and as a consequence, electricity causes the result to occur." *Universal Elecs.*, 20 CIT at 340. Though there is a control knob on the unit that allows a person to set the desired temperature in the refrigerator, the consequence of that is too removed to fall within the court's requirement. There is no immediate and exact change as is the case with the remote control; rather, the electrical signal is sent as a result of the thermostat or defrost timer sensing the change in temperature or activity of the compressor. Thus, the desired output is not as much a consequence of the information that was input by the user as it is a consequence of the information sensed by the item. The refrigerator control box subassembly is therefore not equipped with two or more apparatus "for electric control." Thus, the merchandise in question does not fall within the provisions of Heading 8537.

V
CONCLUSION

For the foregoing reasons, Whirlpool's Motion for Summary Judgment is Denied and the Government's Motion for Summary Judgment is Granted. Accordingly, Customs' classification of Whirlpool part number 2204604 in HTSUS Subheading 9032.89.60 is affirmed.

Knowles Electronics v. United States, 504 F.2d 1403 (1974). Defendant's Brief at 19. Defendant also argues that if the two headings are equally specific it will be classified in Heading 9032 pursuant to GRI 3(c), "under the heading which occurs last in numerical order among those which equally merit consideration." *Id.* (quoting HTSUS GRI 3(c)).

WHIRLPOOL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 03–00526

ORDER AND JUDGMENT

This case having come before the court upon the Motion for Summary Judgment filed by Plaintiff Whirlpool Corporation ("Plaintiff's Motion"), and Defendant's Motion for Summary Judgment filed by Defendant United States ("Defendant's Motion"); the court having reviewed all papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion is DENIED; and it is further

ORDERED, ADJUDGED and DECREED that Defendant's Motion is GRANTED; and it is further

ORDERED, ADJUDGED and DECREED that the imported item at issue in this case is properly classified under Heading 9032, Subheading 9032.89.60 of the Harmonized Tariff Schedule of the United States (1999), at a duty of 1.7% *ad valorem*; and it is further

ORDERED, ADJUDGED and DECREED that judgment be, and hereby is, entered in favor of Defendant and against Plaintiff; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Wednesday, July 25, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish deleted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before July 25, 2007.

Slip Op. 07–115

PS CHEZ SIDNEY, L.L.C., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, and UNITED STATES CUSTOMS SERVICE, Defendants, and CRAWFISH PROCESSORS ALLIANCE, *et al.*, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 02–00635

[Defendant's Motion for Rehearing is PARTIALLY GRANTED and PARTIALLY DENIED.]

Dated: July 26, 2007

Wolff Ardis, P.C. (*William E. Brown*) for Plaintiff PS Chez Sidney, L.L.C.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand* and *Paul D. Kovac*); Office of the General Counsel, United States International Trade Commission (*David A.J. Goldfine*, *Michael Diehl* and *Neal J. Reynolds*); and (*Charles Steuart* and *Ellen C. Daly*), United States Customs and Border Protection; for Defendant United States International Trade Commission and United States Customs and Border Protection.

Adduci, Mastriani & Schaumberg, LLP (*Will Ernest Leonard* and *John Charles Steinberger*) for Defendant-Intervenors Crawfish Processors Alliance, Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner.

Arnold & Porter (*Michael T. Shor* and *Claire E. Reade*) for Giorgio Foods, Inc., appearing *amicus curiae* in support of Plaintiff.

Sonnenschein Nath & Rosenthal (*Michael A. Bamberger*, *Howard H. Weller*, and *Stephen L. Gibson*) for INA USA Corporation, appearing *amicus curiae* in support of Plaintiff.

Collier Shannon Scott, PLLC (*David A. Hartquist*) Special Counsel to the Committee to Support U.S. Trade Laws; *Stewart and Stewart* (*Terence P. Stewart*); and *Douglas W. Kmiec*, for The Committee to Support U.S. Trade Laws, appearing *amicus curiae* in support of Defendant.

OPINION

Wallach, Judge:

I
INTRODUCTION

Defendant United States moves for reconsideration of this court's decision in *PS Chez Sidney L.L.C. v. United States Int'l Trade Comm'n*, 442 F. Supp. 2d 1329 (CIT 2006), which granted Plaintiff's First Amendment claims and denied Plaintiff's other claims in its Motion for Summary Judgment, and granted Defendant's Motion for Summary Judgment on all claims except for Plaintiff's First Amendment claims.[1] Plaintiff does not oppose this Motion.

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[1] Plaintiff's Complaint contains two claims, one alleging that Plaintiff is an eligible do-

Defendant requests that the court vacate its certification on the issues of severability of the statute and damages and set a briefing schedule upon these issues. The court denies Defendant's request for rebriefing. The issues have already been briefed by the parties. The court will not vacate its prior decision, but this opinion will amend it to resolve the issues of severability and damages. The court finds severability and remands to the agency concerning damages.

II
BACKGROUND

In *Chez Sidney*, this court held the support requirement of the Continued Dumping and Subsidy Offset Act ("CDSOA" or "Byrd Amendment")[2] unconstitutional as violative of the First Amendment right to free speech. *Chez Sidney*, 442 F. Supp. 2d at 1333. No provision for severability or remedies was made because the court certified these issues for appeal to the Court of Appeals for the Federal Circuit pursuant to USCIT R. 54(b). Familiarity with this court's prior opinion is presumed.

III
STANDARD OF REVIEW

USCIT R. 59(a)(2) permits a rehearing for any of the reasons for which rehearings have been granted in suits in equity in United States courts. In deciding whether to grant or deny a motion for rehearing, the court may use its discretion. *Xerox Corp. v. United States*, 20 CIT 823, 823 (1996). The purpose of a rehearing is not to relitigate the merits of the case. *Intercargo Insurance Co. v. United States*, 20 CIT 951, 952, 936 F. Supp. 1049 (1996). A court will grant a rehearing only in limited circumstances, including: 1) an error or irregularity; 2) a serious evidentiary flaw; 3) the absence of new evidence which even a diligent party could not have discovered in time; or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case. *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990) (quoting *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 336–37, 601 F. Supp. 212 (1984)).

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mestic producer under the Continued Dumping and Subsidy Act ("CDSOA"), and the other alleging that the CDSOA violates its First Amendment right to free speech under the Constitution. Complaint ¶¶ 25–27, *Chez Sidney*, 442 F. Supp. 2d 1329.

[2] 19 U.S.C. § 1675c (2000), Pub. L. No. 106–387, Title X § 1002, 114 Stat. 1549, *repealed by* Pub. L. No. 109–171, Title VII Subtitle F § 7601(a), 120 Stat. 154 (2006).

IV
DISCUSSION
A
Defendant's Arguments in its Motion for Reconsideration

Rule 54(b) states that when numerous claims for relief are presented, the court may direct final judgment on fewer than all of the claims *only* "upon an express determination that there is *no just reason for delay* and *upon an express direction for the entry of judgment*." USCIT R. 54(b) (emphasis added). Defendant argues that the requirements of Rule 54(b) have not been met. Defendant's Rule 59 Motion for Rehearing ("Defendant's Motion") at 2. Defendant cites *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976) and *W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Research Assocs., Inc.*, 975 F.2d 858, 862 (Fed. Cir. 1992), for the proposition that "[a] mere 'recital' of the phrases required by the rule does not suffice to render a partial judgment appealable." Defendant's Motion at 3. Defendant further argues that because Plaintiff's claim has not been fully decided and there is no reason to hold that there is "no just cause for delay," the Federal Circuit lacks jurisdiction to review an appeal. *Id.* at 4.

Defendant also argues that *Chez Sidney* is not a final judgment with respect to Plaintiff's constitutional claim and therefore Rule 54(b) does not apply. *Id. Chez Sidney*, Defendant argues, leaves unresolved Plaintiff's request for a declaratory judgment, an injunction, and damages in the amount of the distribution it would have been entitled to if it were determined to be an affected domestic producer. *Id.* at 6–7.

Alternatively, Defendant argues that even if *Chez Sidney* was a final judgment, there has been no finding that there is "no just cause for delay." *Id.* at 7.

Plaintiff requests that if the court grants Defendant's Motion, it issue a supplemental opinion resolving the issues of severability and damages. Plaintiff PS Chez Sidney, L.L.C.'s Reply Brief to Defendant's Rule 59 Motion for Rehearing ("Plaintiff's Response") at 2. Plaintiff adds that these issues have already been briefed. *Id.*

The Defendant's Motion for Rehearing is well taken. The court erred in its issuance of a 54(b) certification to permit a speedy appeal. Accordingly, it considers the issues of severability and damages in the following analysis.

B
Severability

Plaintiff argued in its original First Amendment Brief that the "expression of support" eligibility requirements in §§ 1675c(b)(1)(A)

and 1675c(d)(1)[3] are severable from the statute without altering the statute's overriding purpose to aid injured members of domestic industry.[4] Brief on First Amendment Issue by Plaintiff PS Chez Sidney, L.L.C. ("Plaintiff's 1st Am. Brief") at 21. Plaintiff proposes severing from the "affected domestic producer" definition in § 1675c(b)(1)(A) the line reading "was a petitioner or interested party in support of the petition." *Id.* at 22; *see* 19 U.S.C. § 1675c(b)(1)(A). From the subsection describing the eligible beneficiaries for the affected domestic producers list in § 1675c(d)(1), Plaintiff suggests deleting "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." *Id.*; *see* 19 U.S.C. § 1675c(d)(1).

Defendant United States Customs and Border Protection ("Customs") argues that the support provision of the CDSOA is severable, resulting in a narrowing of the eligible class of affected domestic producers to only the petitioners. Defendant's, United States Customs Service, Supplemental Brief in Support of the Constitutionality of the Continued Dumping and Subsidies Offset Act ("Defendant's 1st

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[3] An "affected domestic producer" is described in 19 U.S.C. § 1675c(b)(1)(A) as:

> a petitioner or interested party *in support of* the petition with respect to which an antidumping duty order . . . has been entered.

19 U.S.C. § 1675c(b)(1)(A) (emphasis added).

The description of parties eligible for distribution of antidumping and countervailing duties assessed in § 1675c(d)(1) states:

> The Commission shall forward to the Commissioner within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and *a list of persons that indicate support of the petition by letter or through questionnaire response*. . . .

19 U.S.C. § 1675c(d)(1) (emphasis added).

[4] *Amicus* INA USA Corporation argues that the support provision is not severable from the remainder of the CDSOA because it is "so central" to the operation of the statute. Amicus Brief of INA USA Corporation as to First Amendment Issues at 22.

Amicus Giorgio Foods, Inc. argues that the CDSOA is severable because absent the unconstitutional support provision, the statute is still consistent with the Congressional purpose of enhancing the remedial effect of the antidumping and countervailing duty statutes. *micus Curiae* Brief of Giorgio Foods, Inc. at 26–27. The statute's legislative history also does not indicate that Congress intended to affect speech. *Id.* at 27–28.

Amicus The Committee to Support U.S. Trade Laws ("CSUSTL") argues that deleting the language "in support of the petition" from § 1675c(b)(1)(A), and "a list of persons that indicate support of the petition by letter or through questionnaire response" from § 1675c(d)(1), would excise the disputed language from the statute. Brief of Amicus Curiae, [CSUSTL] at 44. Like Defendant, CSUSTL proposes severing the statute in such a way that would narrow the eligible group of beneficiaries to only the petitioners. *Id.* at 44. CSUSTL further argues that Plaintiff and *amicus* Giorgio's suggestions are overbroad and out of line with Supreme Court precedent holding that courts should "refrain from invalidating more of a statute than is necessary." *Id.* at 45 (quoting *Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987)).

Am. Response") at 44. Defendant nonetheless says that the CDSOA would still fulfill Congressional intent to remedy the ill effects of dumping. *Id*.

> Moreover, the overall goals of restoring free trade and remedying the ill-effects of foreign dumping and subsidization would still be met should severance occur.

Id. The court, Defendant continues, is prohibited from enlarging the scope of the beneficiary class in severing the provision from the statute. *Id.* at 45 (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424–45, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990) (finding that money cannot be removed from the Treasury absent Congressional allocation)). Defendant further argues that the beneficiary class after severance can only become smaller. *Id.* From the "affected domestic producer" definition in 19 U.S.C. § 1675c(1)(A), Defendant proposes deleting "interested party in support of the petition." *Id.* at 44. From the subsection concerning the list of affected domestic producers, Defendant suggests deleting "list of persons that indicate support of the petition by letter or through questionnaire response." *Id.*; *see* 19 U.S.C. § 1675c(d)(1).

When faced with an unconstitutional provision, "the presumption is in favor of severability." *Regan v. Time*, Inc., 468 U.S. 641, 653, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984). The general test for determining whether severability is permissible is two-pronged: 1) if the legislature would have enacted the remaining provisions without the unconstitutional portion and 2) if the remaining provisions can function independently, consistent with legislative intent. *Alaska Airlines, Inc.*, 480 U.S. at 684–85. "Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Regan*, 468 U.S. at 652 (quoting *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96, 30 S. Ct. 21, 54 L. Ed. 106 (1909)). Consequently, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam)). The relevant inquiry for the court is whether the statute will "function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc.*, 480 U.S. at 685; *see also Carnival Cruise Lines, Inc. v. Untied States*, 200 F.3d 1361, 1367 (Fed. Cir. 2000). In severing a statute, the court "should refrain from invalidating more of the statute than is necessary." *Regan*, 468 U.S. at 652.

Subsequent to *Chez Sidney*, the court issued *SKF v. United States*, 451 F. Supp. 2d 1355 (CIT 2006), in which the court made a provision for remedies in a similar case holding the CDSOA unconstitutional, albeit on different Constitutional principles. The court in *SKF*

found the expression of support provision "easily severable from the rest of the CDSOA and [that severing] will not render the statute useless." *Id.* at 1365. This court agrees with *SKF* that unconstitutional portions of the CDSOA are indeed severable from the remaining provisions of the statute. *See id.*

Supreme Court precedent cautions courts both not to enlarge the scope of a statute when severing offending portions and not to invalidate more than is necessary. *See Office of Pers. Mgmt.*, 496 U.S. at 424–25; *Regan*, 468 U.S. at 652–53. In this court's prior decision, no necessary connection between support for an antidumping petition and harm to a domestic producer was found in the support question contained in the United States International Trade Commission ("ITC") requirement and the court found the requirement simultaneously over and under inclusive. *Chez Sidney*, 442 F. Supp. 2d at 1358.

The offending language in the statutory definition of an "affected domestic producer" is "in support of the petition." 19 U.S.C. § 1675c(b)(1)(A). The deletion of this text from the subsection of the statute removes the unconstitutional language while fulfilling the Congressional purpose of remedying the injurious effects of dumping on domestic producers. *See, e.g.*, 146 Cong. Rec. H9708 (daily ed. October 11, 2000) (statement of Rep. Nancy Johnson). The new definition of "affected domestic producer" in § 1675c(b)(1)(A) is thus a

> petitioner or interested party[5] in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered. . . .

19 U.S.C. § 1675c(b)(1)(A) (strikeout portions indicate deleted text). With this modification, the eligible group of beneficiaries of CDSOA offset distributions now includes affected domestic producers of the like product who are petitioners or interested parties[6] in the antidumping investigation.[7] The CDSOA can still be administered the same way.

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[5] An interested party, which is defined in 19 U.S.C. § 1677(9), includes any affected domestic producer. For purposes of CDSOA distributions, an "interested party" is defined by statute as "a manufacturer, producer, or wholesaler in the United States of a domestic like product." 19 U.S.C. § 1677(9)(C). The term "domestic like product" is defined in § 1677(10) as "a product which is like, or in the absence of like, most similar in the characteristics and uses with, the article subject to an investigation under this title."

[6] See definition of interested parties, *supra*, note 5.

[7] Only "affected domestic producers" who are "interested parties" located within the United States are eligible to receive CDSOA offset distributions because 1) the term "affected *domestic* producer" is listed in the statute, 19 U.S.C. § 1675c(b)(1) (emphasis added), and 2) each potentially eligible affected domestic producer must file a certification with the ITC after publication of the list of eligible affected domestic producers, stating that it is "eligible to receive the distribution as an affected *domestic* producer," 19 U.S.C. § 1675c(d)(2)(B) (emphasis added).

The support requirement is also mentioned in § 1675c(d)(1), in the subsection that directs the ITC to forward the list of eligible affected domestic producers to Customs. The phrase "and a list of persons that indicate support of the petition by letter or through questionnaire response" must be stricken from that provision in order for the statute to pass Constitutional muster. 19 U.S.C § 1675c(d)(1). The new statutory language in § 1675c(d)(1) reads, in pertinent part:

> The Commission shall forward to the Commissioner . . . a list of petitioners and persons[8] with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administrating authority to determine the identity of the petitioner and those domestic parties. . . .

19 U.S.C. § 1675c(d)(1) (strikeout portions indicating deleted text). With the deletion of the unconstitutional language, all "affected domestic producers" who are either petitioners or interested parties in an antidumping petition are eligible to be included on the ITC's list for CDSOA offset distributions. This subsection may otherwise be administered in the same manner as before.

C
Damages

In its Complaint, Plaintiff originally sought to be added to the list of affected domestic producers pursuant to the CDSOA to be eligible for an offset distribution in fiscal year 2002.[9] Complaint ¶¶ 1, 35. It alternatively sought in its prayer for relief damages in the amount of the offset distributions to which it would be entitled if it was determined to be eligible, whether from antidumping duties already distributed or still maintained in the general fund. *Id.* ¶13.

Chez Sidney was denied CDSOA offset distributions and inclusion on the "affected producer" list by both Customs and the ITC for fiscal year 2002 because its final questionnaire response did not demonstrate the requisite support. *Chez Sidney*, 442 F. Supp. 2d at 1334–35. Those agency determinations were guided by an unconstitutional

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[8] "Persons" shall be interpreted as including interested parties. *See* note 5.

[9] Plaintiff also sought a preliminary injunction enjoining Customs from "distributing, returning to the general fund, or otherwise transferring or disposing" of Chez Sidney's pro rata share of antidumping duties collected on crawfish tail meat from China in fiscal year 2002, which was denied by this court because of its failure to demonstrate irreparable harm. Plaintiff's Motion for Preliminary Injunction at 1; *see PS Chez Sidney v. United States Int'l Trade Comm'n*, Court No. 02–00635 (November 8, 2002) (Order denying Plaintiff's Motion for Preliminary Injunction).

provision in the statute. With the support requirement now removed from the "affected domestic producer" definition, the grounds for Customs' and the ITC's decisions will not suffice. *See SKF*, 451 F. Supp. 2d at 1366.

Accordingly, Chez Sidney is eligible to be included on the ITC's list of "affected domestic producers" because it participated in the antidumping investigation of *Freshwater Crawfish Tail Meat From the People's Republic of China; Initiation of Antidumping Investigation*, 61 Fed. Reg. 54,154, 54,155 (October 17, 1996). The court remands this matter to both the ITC and Customs, respectively. First the ITC must determine if Chez Sidney meets all other requirements to qualify as an affected domestic producer. If it determines this question in the affirmative, then Customs shall assess the sufficiency of Chez Sidney's claim and, if appropriate, include it among the eligible producers for fiscal year 2002. If Chez Sidney has applied for offset distributions in subsequent fiscal years, the ITC and Customs shall redetermine as appropriate Chez Sidney's eligibility for distributions for those fiscal years. As in *SKF*, Customs is directed to determine how Chez Sidney shall receive its pro rata share, if any, of the 2002 CDSOA disbursements. *See SKF*, 451 F. Supp. 2d at 1366.

V
Conclusion

This matter is remanded to the ITC and Customs to add Chez Sidney to the list of domestic producers eligible for CDSOA offset distributions for fiscal year 2002. The court holds that "support of," the unconstitutional language of the CDSOA, is hereby severed from the remainder of the statute.

PS CHEZ SIDNEY, L.L.C., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, and UNITED STATES CUSTOMS SERVICE, Defendants, and CRAWFISH PROCESSORS ALLIANCE, *et al.*, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 02–00635

ORDER AND JUDGMENT

Upon consideration of Defendant's Motion for Rehearing ("Defendant's Motion"); the court having reviewed all pleadings and papers on file herein, and good cause appearing therefor, it is hereby

ORDERED that Defendant's Motion is GRANTED with regard to its request that the court vacate its certification on the issues of severability of the statute and damages, and DENIED with regard to its request for rebriefing; and it is further

ORDERED that this matter is remanded to the United States International Trade Commission and the United States Customs and Border Protection to redetermine PS Chez Sidney, L.L.C.'s eligibility for disbursements under the Continued Dumping and Subsidy Offset Act, and to determine how Plaintiff shall receive its pro rata share, if eligible.

Slip Op. 07–116

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SKF USA INC., Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, ROBERT C. BONNER (COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION), UNITED STATES INTERNATIONAL TRADE COMMISSION, and STEPHEN KOPLAN (CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION), Defendants, and TIMKEN US CORPORATION, Defendant-Intervenor.

Court No. 05–00542

Dated: July 26, 2007

Steptoe & Johnson LLP (*Herbert C. Shelley*, *Alice A. Kipel*, *Susan R. Gihring* and *William G. Isasi*) for SKF USA Inc., Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); of counsel: *Charles Steuart*, United States Bureau of Customs and Border Protection, for the United States, Defendant.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, Office of the General Counsel, Unites States International Trade Commission (*David A.J. Goldfine*) for the United States International Trade Commission and Stephen Koplan, Chairman, Defendant.

Stewart and Stewart (*Terence P. Stewart*, *Amy S. Dwyer* and *J. Daniel Stirk*), for Timken US Corporation, Defendant-Intervenor.

OPINION

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (2000).

II. Standard of Review

As set out in the Administrative Procedure Act ("APA")[1] this Court "will set aside Customs' denial of offset distribution only if it is 'arbi-

[1] The provisions of subchapter II and chapter seven of title five of the United States Code were originally enacted on June 11, 1946, and are popularly known as the Administrative Procedure Act. It has been amended since. *See* 5 U.S.C. §§ 551–559, 701–706.

trary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Dixon Ticonderoga Co. v. United States*, 486 F.3d 1353, 1354 (Fed. Cir. 2006) (quoting *Candle Corp. of America v. U.S. Int'l Trade Comm'n*, 374 F.3d 1087, 1091 (Fed. Cir. 2004) (citing 5 U.S.C. § 706 (2000))).

III. Background

On September 12, 2006, this Court issued an order directing the United States International Trade Commission ("ITC" or "Commission") and the Bureau of Customs and Border Protection ("Customs")[2], to "re-examine their decision to deny SKF [Continued Dumping and Subsidy Offset Act of 2000] disbursements for the 2005 fiscal year in accordance with" this Court's decision in *SKF USA Inc. v. United States* ("*SKF USA*"), ___ CIT ___ , 451 F. Supp. 2d 1355 (2006). On December 8, 2006, Customs filed its remand determination. *See Reconsideration of the Fiscal Year 2005 CDSOA Certification of SKF USA, Inc.* ("*Customs' Reconsideration*"), December 8, 2006.[3] On December 11, 2006, the ITC filed its remand determination. *See* Letter from Patrick V. Gallagher, Jr., ITC, to the Honorable Tina Potuto Kimble, Clerk of the Court (Dec. 11, 2006) ("*ITC Remand Determination*"). On January 10, 2007, SKF USA Inc. ("SKF" or "Plaintiff") and Defendant-Intervenor, Timken U.S. Corp. ("Timken") filed their comments upon the remand results. *See* Pl.'s Comments on Remand Determinations Issued By Def. United States Customs and Border Protection and Defendant United States International Trade Commission ("SKF Comm.") at 10; Defendant- Intervenor's Comments on the Remand Results ("Timken Comm.") at 4.

In its remand, the ITC determined that SKF "did participate in the original investigation by questionnaire response and the company is eligible, using the definitions announced in [*SKF USA*], to be placed on the list prepared by the [ITC] under the Byrd Amendment for the order covering ball bearings from Japan." *ITC Remand Determination* at 2. As such, the ITC "revised the Byrd Amendment list for the antidumping duty order on ball bearings from Japan to include" SKF. *Id.* at 2.

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[2] The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. *See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection*, 72 Fed. Reg. 20,131 (April 23, 2007).

[3] Though the ITC issued its remand in the form of a letter to the Honorable Tina Potuto Kimble, Clerk of the Court, CIT, on December 11, 2006, the ITC did previously advise Customs of the results. *See Custom's Remand Determination* at 1 ("The ITC has informed [Customs] that SKF has been added to its list of potential affected producers for Bearings from Japan . . . for fiscal year 2005.").

In its remand, Customs stated:

> In its July 13, 2005, certification, SKF sought a disbursement in the amount of its total qualifying expenditures, $115,033,000.00. Including SKF's certification, the total qualifying expenditures submitted by affected domestic producers for Commerce Case No. A–588–804[4] would have been $3,873,340,322.67. A total of $47,810,802.17 was available for distribution to affected domestic producers in this Commerce Case. In accordance with 19 U.S.C. § 1675c(d)(3) and 19 C.F.R. § 159.64(c)(2), affected domestic producers would only been titled to receive a pro rata share of the available funds because the total qualifying expenditures certified exceeds the amount available for distribution. SKF's certified qualifying expenditures represent 2.9699% of the total qualifying expenditures for this Commerce Case No. A–588–804.
>
> If, after all opportunities for rehearing and/or appeal have been exhausted, [*SKF USA*] is the final court decision upon this action, SKF would receive a distribution for up to $1,419,933.01 in CDSOA funds for fiscal year 2005, to the extent these funds are either recoverable from the affected domestic producers who initially received them or are available . . . .

Custom's Remand Determination at 1–2.

On January 10, 2007, SKF filed comments to both the *ITC Remand Determination* and *Customs' Reconsideration* with this Court. *See* SKF Comm. at 10. Comments were also submitted by Timken on the same day. *See* Timken Comm. at 4. Rebuttal comments were submitted by the ITC, Customs and Timken on January 30, 2007. *See* Def. U.S. International Trade Commission's Response to Pl.'s Comments on the Commission's Remand Determination ("ITC's Reb.") at 1–9; Response to Comments Upon Remand Results ("Customs' Reb.") at 16; Rebuttal Comments of Timken US Corporation to SKF USA's Comments on the Remand Results ("Timken's Reb.") at 15.

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[4] Commerce determined that there were sales at less-than-fair value resulting in an antidumping duty order. *See Antidumping Duty Orders for Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, Inv. No. A–588–804, 54 Fed. Reg. 20,904 (Dep't Commerce May 15, 1989). Following the enactment of the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), the ITC provided Customs with a list of entities (*i.e.* manufacturer, producer, farmer, rancher, or worker representative) eligible as "affected domestic producers," on which SKF was not originally included. *See SKF USA*, ____ CIT at ____ , 451 F. Supp. 2d at 1358.

IV. Discussion

A. Contentions of the Parties

1. SKF's Contentions

SKF agreed with the final results of both *Customs' Reconsideration* and the *ITC Remand Determination* (collectively, the "Remand Determinations") to the extent that both Customs and the ITC (collectively, the "Defendants") now find that SKF is eligible to be placed on the list of "affected domestic producers" and is as such eligible to receive distributions under 19 U.S.C. § 1675c. *See* Pl.'s Comm. at 2. SKF, however, objects to the ITC having "only revised the CDSOA 'affected domestic producer' list to include [SKF] for the antidumping duty order on ball bearings from Japan." *Id.* at 3.

SKF stresses that "the investigation in which the [ITC] noted that [SKF] participated was not limited to Japan, but covered ball bearings from nine countries." *Id.* at 3. SKF further contends that this Court's decision in *SKF* "with regard to the ITC was limited only as to fiscal year 2005. It was not limited as to country." *Id.* at 4. Furthermore, SKF contends that a determination that SKF is eligible for disbursements under *all* outstanding ball bearing orders would be consistent with SKF's last request for relief, which requested that this Court:

> issue an order severing from the antidumping law, those provisions of 19 U.S.C. 1675c . . . that limit eligibility for disbursements to only those domestic producers that support antidumping petitions and declaring those provisions unconstitutional, null and void, and issue an order declaring that [SKF] is entitled to be considered for distribution of a proportionate share of CDSOA disbursements for fiscal year 2005.

Id. at 5 (citing to Am. Complaint at 17, ¶ 4).

SKF further argues that as Customs relied solely on SKF's July 13, 2005 certification, Customs thereby failed to consider the amended certification for Japan, as well as other certifications. *See id.* at 6. SKF specifically raises Customs' refusal to consider an amended certification for disbursements under the antidumping order against ball bearings from Japan, as well as certifications for seven other countries, which SKF filed with Customs on September 28, 2006. *Id.* at 6. SKF contends that this "refusal to use the amended certification to calculate [SKF's] proportional share of disbursements is unsupportable." *Id.* at 6.

2. ITC's Contentions

The ITC contends that when "SKF filed its appeal in October 2005, [SKF] made clear that it was challenging only the two agency's actions relating to its requests for Byrd Amendment distributions for the Japanese order." ITC Reb. at 2; (citing to Complaint, ¶¶ 7, 15).

The ITC stresses that SKF's claim "reflects a not particularly subtle attempt to broaden the scope of [SKF's] appeal and the nature of the Court's decision on this matter." *Id.* at 4.

The ITC stresses that the scope of the Court's review in the case at bar " 'is confined to the record developed before the agency[.]' " *Id.* at 5 (citing to *Ammex, Inc. v. United States*, ___ CIT ___ , 341 F. Supp.2d 1308, 1311 (2004)). Thus, the ITC argues, "the decisions subject to this appeal are *only* the [ITC's] and Customs' denial of [SKF's] requests to be declared eligible for Byrd distributions relating to the Japanese ball bearings order for fiscal year 2005." *Id.* at 5. The ITC further stresses that "at no point in [the] administrative process did [SKF] even suggest that the [ITC] or Customs had been mistaken in interpreting their requests as relating only to the Japanese ball bearings order." *Id.* at 6. Additionally, the ITC argues that SKF had previously made it clear that it was its intent to challenge the actions of Customs and the ITC in denying its request under the Japanese ball bearing order, and that SKF only challenged the actions of the Defendants in connection with the disbursement of funds collected under an antidumping order on ball bearings from Japan. *See id.* at 6 (citing to Complaint at ¶ 7). The ITC concludes by contending that this Court's opinion in *SKF USA* did not indicate that the ITC or Customs "should go beyond the scope of their underlying determinations and this appeal by making a new set of decisions as to whether [SKF] was entitled to receive Byrd distributions under any order than the order covering Japan." *Id.* at 7.

3. Timken's Contentions

Timken initially disagreed with the decision in *SKF USA*, in which this Court declared that the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") violates the Equal Protection Clause. *See* Timken Br. at 1–2. Though "Timken disagrees with the Court's conclusions and reserves its right to appeal, Timken believes the determinations of the ITC and [Customs] are consistent with the opinion of the Court[.]" Timken Br. at 3. Timken, however, contends that Customs has made a ministerial error by certifying SKF's qualifying expenditures to 2.9699%, thereby entitling SKF to receive $1,419,933.01 of the $47,810,802.17 available for distribution. *See id.* at 3. Timken argues that Customs had previously rounded the allocation percentage to the billionth decimal place, and not the ten thousandth, as is indicated above. *See id.* (citing to *FY 2005 CDSOA Annual Disbursement Report*). Timken surmises that SKF's "correct allocation percentage should be 2.969865553% and the distribution [SKF] would potentially receive from the total available, $47,810,802.17, would be up to $1,419,916.54." *Id.*

Additionally, Timken contends that SKF's comments on the remand determinations are not responsive to the remand results and should thus be rejected. *See* Timken's Reb. at 2. Timken states that

an agency's "determination 'will be upheld as long as the Court can reasonably discern how the agency arrived at the decision' as long as it is 'in accordance with law.' " *Id.* at 2; (citing to *Cathedral Candle Co. v. United States*, 27 CIT ___ , ___ , 285 F. Supp.2d 1371, 1375 (2003)).

Timken contends that both Customs and the ITC correctly limited their determinations on remand to the question of SKF eligibility for CDSOA distribution with respect to the antidumping order on ball bearings from Japan alone, as SKF only sought eligibility for and distribution to the antidumping duty order on ball bearings from Japan. *Id.* at 2–3. Timken asserts that in the case at bar judicial review of agency determinations must be based on all the documents before the agency at the time of determination. *See id.* at 3. Timken further asserts that the full record of documents used by both Customs and the ITC indicates that SKF "referred only to the Japan ball bearings order in requesting agency action." *Id.* at 4. As such, Timken assert that both the ITC and Customs remand determinations were consistent with this Court's remand instructions from *SKF USA*, 30 CIT at ___ , 451 F. Supp. 2d at 1367. *See id.* at 6.

Timken further argues that even if SKF's "new certification covering seven additional orders and qualifying expenditures of $8,164,858,000 could have been considered on remand [Customs] would not have been required to accept certifications filed over a year too late on September 28, 2006, contrary to the statutory and regulatory deadlines governing FY2005 certifications and distributions." *Id.* at 8. Timken stresses that "in order to receive CDSOA distributions for FY2005, Custom's regulations required eligible affected domestic producers to file certifications . . . by August 1, 2005." *Id.* at 9 (citing to 19 C.F.R. § 159.63(a); 70 Fed. Reg. 31,566 (June 1, 2005)). Timken concludes by contending that in *SKF USA* this Court stated that it entrusted Customs to determine how SKF receives its pro rata share of the FY2005 CDSOA disbursements, and Customs' action since the decision have complied with this Court's instructions. *See id.* at 15 (citing to *SKF USA*, ___ CIT at ___ , 451 F. Supp. 2d at 1366).

4. Customs' Contentions

Customs begins its contentions by agreeing with Timken's argument that SKF's CDSOA distribution was miscalculated through a ministerial error. *See* Customs' Reb. at 3. Customs asserts that it initially erred in calculating the allotted SKF distribution at 2.9699%, as opposed to the proper 2.969865553% allocation. *See id.* Accordingly, Customs requests that this Court "grant a remand to Customs for the limited purpose of correcting a ministerial error in its calculation of the CDSOA distribution SKF will be entitled to pursuant to [*SKF USA*], if [*SKF USA*] remains the final Court decision after all appeals have been exhausted." *See id.* at 4.

Despite the above request for recalculation, Customs asserts that both Customs and the ITC complied with *SKF USA* when they issued their remand results. *See id.* Customs argues that when reviewing whether Customs' or the ITC's interpretation and application of the CDSOA are in accordance with law, courts apply the standard of review set forth in the APA. *See id.* at 6. Customs further argues that in the APA context:

> an action must meet two requirements to be "final"pursuant to 5 U.S.C. § 704: (1) " the action must mark the 'consummation' of the agency's decision making process," *Bennet v. Spear*, 520 U.S. 154, 177–78 (1997); and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Id.* at 178. Because SKF only challenged the ITC's administrative determination not to add SKF to the ADP list with respect to the ball bearings from Japan antidumping investigation, the ITC has not taken any administrative action with respect to other antidumping or countervailing duty orders. Thus, there is no other action which is subject to review because neither of the requirements established in the case law are met. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990).

Customs' Reb. at 7–8. Customs asserts that in the case at bar there can be no "consummation" of the decision making process as Customs has not yet made a decision upon whether to apply its overpayment provision and as there is no decision for this Court to review. *See id.* at 14. Customs asserts that a decision not to take enforcement action is immune from judicial review pursuant to 5 U.S.C. § 701(a)(2). *See id.*

Customs further contends that it complied with this Court's order in *SKF USA*, and did not err in neglecting to consider SKF's September 28, 2006 submission to the ITC in determining SKF's entitlement to CDSOA distributions as SKF was untimely in filing the materials. *See id.* at 9–11. Customs asserts that "all CDSOA certifications were due to be filed within 60 days of Customs' July 3, 2005 publication of *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed. Reg. 44,722." *Id.* at 10–11. Customs then further asserts that if SKF believed its certification contained incorrect figures, it had ten days after Customs issued its July 15, 2005 notification denying SKF certification within which to correct that certification. *Id.* at 11 (citing to 19 C.F.R. § 159.63(c)). Based on all the above arguments, Customs concludes that this Court should maintain its ruling entrusting Customs "to determine how to ensure SKF receives its pro rata share of the 2005 CDSOA disbursements as it deems fit, understanding that Customs has regulatory authority at its disposal to redistribute the disbursed

funds, such as 19 C.F.R. § 159.64(b)(3)." *Id.* at 15 (citing to *SKF USA*, ___ CIT at ___ , 451 F. Supp. 2d at 1366).

B. Analysis

1. Customs' Calculation Error in Calculating the Offset Distribution Amount Is *De Minimis* in Nature and Thus Does Not Warrant a Remand.

As stated *supra*, Timken contends that SKF's "correct allocation percentage should be 2.969865553% and the distribution [SKF] would potentially receive from the total available, $47,810,802.17, would be up to $1,419,916.54." Timken's Comm. at 3. The Government has confirmed that "Customs' remand determination contains a ministerial error in the calculation of the CDSOA distribution SKF would be entitled to receive pursuant to [*SKF USA*]." Customs' Reb. at 3. The Government further requests that "the Court grant a remand to Customs for the limited purpose of correcting a ministerial error in its calculation of the CDSOA distribution SKF will be entitled to pursuant to [*SKF USA*.]" *Id.* at 4.

The remand, however, if granted, would lead to an adjustment of a mere $16.47. Despite the Government's admission of an administrative error on the part of Customs, this Court finds that the error was *de minimis* in nature and that a remand would be a waste of time, effort, and taxpayers' funds.

2. Customs' and the ITC's Remand Determinations FullyComply with *SKF USA*.

In an APA action, such as the case at bar, courts "shall compel agency action" which is "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1)(2000). "[A]gency action includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13)(2000). This Court only possesses jurisdiction to entertain challenges to administrative actions. *See* 28 U.S.C. 1581(i)(2000). In *SKF USA*, this Court remanded the present matter "to the ITC and Customs to review their decisions denying SKF CDSOA disbursements[.]" *SKF USA*, ___ CIT at ___ , 451 F. Supp. 2d at 1367.

In *SKF USA*, SKF requested that this Court "issue a permanent injunction enjoining the Government from making any present or future disbursements pursuant to the CDSOA with respect to duties collected from all antidumping orders covering AFBs[5], or in the alternative, just ball bearings *from Japan*." *SKF USA*, ___ CIT at ___ , 451 F. Supp. 2d at 1363 (emphasis added). As such, SKF further requested that this Court "order Customs to require repayment of all

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[5] AFBs are defined as "antifriction bearings, other than tapered roller bearings and parts thereof" in *SKF USA*, ____ CIT at ____ , 451 F. Supp. 2d at 1357.

CDSOA funds disbursed with respect to all antidumping orders covering AFBs, or in the alternative, just ball bearings *from Japan*[.]" *Id.* (emphasis added).

Furthermore, in a letter dated July 13, 2005, SKF's attorneys requested that Customs distribute CDSOA offsets for Fiscal Year 2005 for offsets "resulting from the antidumping order on ball bearings from Japan." Letter to the Assistant Commissioner of Customs (July 13, 2005). SKF's Counsel therein attached a Continued Dumping and Subsidy Offset Certification, which clearly listed the case name as "Ball Bearings from Japan." *Id.* SKF's Complaint of October 3, 2005 makes specific references to disbursements "pursuant to the CDSOA of assessed fiscal year 2005 funds pertaining to ball bearings from Japan." Complaint at p. 16. SKF additionally raises its "request for disbursement of funds and Customs' disbursement of funds collected under the antidumping order on ball bearings from Japan before December 1, 2005[.]" Complaint ¶ 15. These assertions were later put forth in SKF's amended complaint of January 3, 2006, where SKF states that it challenges the actions of both the ITC and Customs, pursuant to 19 U.S.C. 1675c, "in connection with the disbursements of fundscollected under an antidumping order on ball bearings from Japan." Amended Complaint, ¶ 7. It is thereby clear to this Court that SKF was initially seeking repayment of all CDSOA funds disbursed with respect to all antidumping orders covering AFBs, or in the alternative, just ball bearings from Japan, and only from Japan.

As a result of this Court's decision in *SKF USA*, both the ITC and Customs filed their remand determinations. *See Customs' Reconsideration; ITC Remand Determination*. As SKF only challenged the ITC's decision not to add SKF to the list of affected domestic producers list with respect to the ball bearings from Japan antidumping investigation, the ITC did not take any administrative action with respect to other antidumping or countervailing duty orders. *See ITC Remand Determination*. As such, Customs' remand determination dealt solely with the antidumping duty order on ball bearings from Japan as well. *See Customs' Reconsideration*. By solely referencing the antidumping duty order on ball bearings from Japan both the ITC and Customs complied with this Court's decision in *SKF USA*.

As stated *supra*, under 28 U.S.C. § 1581(i) this Court only possesses jurisdiction to entertain challenges to administrative actions. This Court remanded "this matter to the ITC and Customs to review *their decision* denying SKF CDSOA disbursements in accordance with" the *SKF USA* opinion. *SKF USA*, ___ CIT at ___ , 451 F. Supp. 2d at 1367 (emphasis added). Both the ITC and Customs properly kept their remands within the scope of "the antidumping order on ball bearings from Japan." Letter to the Assistant Commissioner of Customs (July 13, 2005). Furthermore, this Court has stated that it "entrusts Customs to determine how to ensure SKF receives its pro

rata share of the 2005 CDSOA disbursements as it deems fit[.]" *SKF USA*, ___ CIT at ___ , 451 F. Supp. 2d at 1366. Nothing in Customs' remand determination makes the Court regret such a lawful entrustment. *See SKF USA*, ___ CIT at ___ , 451 F. Supp. 2d at 1366 (citing to 19 C.F.R. § 159.64(b)(3)).

3. Customs Did Not Err in Refusing to Consider SKF'sfilings of September 28, 2006.

As stated *supra*, SKF claims that Customs erred in refusing to consider an amended filing made on September 28, 2006 for disbursements under the antidumping order against ball bearing from Japan, which also included certifications for seven other countries. Pl.'s Comm. at 6.

Pursuant to statute, Customs must publish a notice of intent to distribute ("Notice of Intent to Distribute") at least 30 days before making CDSOA distributions. *See* 19 U.S.C. § 1675c(d)(2)(2000). After publication of the Notice of Intent to Distribute, Customs' regulations state that claimants, such as SKF, have 60 days in which to file certification to obtain a CDSOA distribution. See 19 C.F.R. § 159.63(a). The timely filing of certifications is important as the "distribution of funds from duties assessed each fiscal year must be distributed not later than 60 days after the end of that fiscal year." *Cathedral Candle Co. V. United States International Trade Comm'n*, 400 F.3d 1352, 1358 (quoting 19 U.S.C. § 1675c(c)).

As per the above analysis, CDSOA certifications in the case at bar were due to be filed within 60 days of Customs' July 3, 2005 publication of *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed. Reg. 44,722. As September 28, 2006 is more than 60 days after July 3, 2005, SKF failed to timely file its amended certification, and Customs thereby did not err in its refusal to consider said documentation.

C. Conclusion

Upon review of the record and the arguments presented by the parties on remand, the *Remand Determinations* are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SKF USA INC., Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, ROBERT C. BONNER (COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION), UNITED STATES INTERNATIONAL TRADE COMMISSION, and STEPHEN KOPLAN (CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION), Defendants, and TIMKEN US CORPORATION, Defendant-Intervenor.

Court No. 05–00542

JUDGMENT

This Court, having received and reviewed the Bureau of Customs and Border Protection's ("Customs") *Reconsideration of the Fiscal Year 2005 CDSOA Certification of SKF USA, Inc.* ("*Customs' Reconsideration*") filed on December 8, 2006, the remand determination filed by the United States International Trade Commission ("ITC") on December 11, 2006 ("*ITC Remand Determination*") (*Customs' Reconsideration* and the *ITC Remand Determination*, collectively, the "*Remand Determinations*"), comments and rebuttal comments of SKF USA Inc., Timken US Corporation, Customs and the ITC, and all other papers filed herein, holds that both Customs and the ITC duly complied with this Court's remand order in *SKF USA Inc. v. United States*, ___ CIT ___ , 451 F. Supp.2d 1355 (2006), and it is hereby

ORDERED that the *Remand Determinations* are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.